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IN THE

Supreme Court of the United States

THE CHICKASAW NATION and
THE CHOCTAW NATION OF OKLAHOMA,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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BRIEF OF *AMICI CURIAE* SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY and LITTLE SIX, INC. IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*[1]

The Shakopee Mdewakanton Sioux (Dakota) Community is a federally recognized Indian tribal government. Little Six, Inc. is an arm and instrumentality of the Community established to operate the Community's gaming operations, which are conducted under the Community's powers of self-government and under authority of federal law to raise revenues for the tribal government. The Community and Little Six are sometimes referred to collectively as the "Community."

The Community and Little Six are the Respondents in *United States v. Little Six, Inc., et al.*, No. 00-1115, petition for certiorari pending. In *Little Six*, a unanimous panel of the United States Court of Appeals for the Federal Circuit held in a straightforward and well-reasoned opinion that the 0.25% excise tax and the related $50 annual occupational tax imposed under Sections 4401(a)(1) and 4411 in Chapter 35 of the Internal Revenue Code (the "Code") do not apply to pull-tab games or other lotteries conducted by Indian tribal governments under the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.* (1994 & Supp. 1997) ("IGRA").[2] 210 F.3d 1361 (Fed. Cir. 2000), reproduced at Pet. App. at 101a.

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1. Pursuant to this Court's Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, and no person or entity other than *amici*, its members, or their counsel made a monetary contribution to the preparation or submission of the brief. *Amici* have secured the consent of all parties to the filing of this brief, and these consents are being filed with the Clerk of the Court.

2. Pull-tab games are a form of lottery in which individuals purchase one or more pull-tab cards from a set of such cards. Pull-tab cards are essentially indistinguishable from the scratch-off lottery tickets sold by many states.

The Federal Circuit grounded its decision on Section 2719(d) of IGRA, which provides (with emphasis supplied by the court, *see* 210 F.3d at 1365):

> (1) The provisions of the Internal Revenue Code of 1986 (including sections 1441, 3402(q), 6041, and 6050I, *and chapter 35 of such Code*) concerning the reporting and withholding of taxes with respect to the winnings from gaming or wagering operations *shall apply to Indian gaming operations* conducted pursuant to this chapter, or under a Tribal-State compact entered into under section 2710(d)(3) of this title that is in effect, *in the same manner as such provisions apply to State gaming and wagering operations*.
>
> (2) The provisions of this subsection shall apply notwithstanding any other provision of law enacted before, on, or after October 17, 1988, unless such other provision of law specifically cites this subsection.

The court concluded that, because Chapter 35 provides an exemption for state lotteries (in its Section 4402(3)) and is one of the specific Code provisions which Section 2719(d) explicitly provides "shall apply to Indian gaming operations . . . in the same manner as such provisions apply to State gaming and wagering operations," Section 2719(d) should be construed to provide an exemption for pull-tab games and other lotteries conducted by Indian tribes. Pet. App. at 108a.

In the present case, the United States Court of Appeals for the Tenth Circuit held that the Chapter 35 taxes *do* apply to tribal pull-tab games and other lotteries, and this Court has granted certiorari to resolve the conflict between the

Tenth Circuit and the Federal Circuit regarding the applicability of the Chapter 35 taxes. The Court has not ruled on the United States's certiorari petition in *Little Six*, apparently holding the case for disposition in light of its decision here.

The Community and Little Six, parties to *Little Six*, have a compelling and obvious interest in the outcome of this case involving the construction of Section 2719(d) of IGRA. The construction question arises because there is an ambiguity in the statute resulting from the inconsistency between Section 2719(d)'s reference to "provisions . . . concerning the reporting and withholding of taxes [from] winnings" and its explicit references to Section 6050I and Chapter 35, which do not relate to winnings. Petitioners' brief focuses most of its attention on the important Indian canon of construction, which requires that the ambiguity in Section 2719(d) be resolved in favor of the reasonable construction advocated by the tribal governments and adopted by the Federal Circuit. *E.g.*, *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992); *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759 (1985); *Squire v. Capoeman*, 351 U.S. 1 (1956) (federal tax case); *Choate v. Trapp*, 224 U.S. 665 (1912); *see also Cook v. United States*, 86 F.3d 1095, 1097 (Fed. Cir.) (federal tax case applying rule that statutes or treaties that contain language that reasonably can be construed to confer a federal tax exemption for Indian tribes or Indians should be so construed in their favor), *cert. denied*, 519 U.S. 932 (1996); *Kirschling v. United States*, 746 F.2d 512, 515 (9th Cir. 1984) (same); *Holt v. Commissioner*, 364 F.2d 38, 40 (8th Cir. 1966) (same), *cert. denied*, 386 U.S. 931 (1967). While the Indian canon provides an independent basis for deciding this case in favor of the Chickasaw and Choctaw Nations, the Community will demonstrate in this brief that the Federal Circuit's construction is the correct construction even without the Indian canon, based on the language of Section 2719(d),

IGRA's overall statutory scheme and purpose, and the relevant legislative history. In addition, the Community wishes to provide the Court with background information regarding Indian gaming and the federal wagering taxes that it believes the Court will find helpful in deciding this case.

STATEMENT REGARDING HISTORY OF INDIAN GAMING AND THE FEDERAL WAGERING TAXES

As state governments did with state lotteries, Indian tribal governments began to conduct bingo, pull-tab games, and other gaming on reservation and trust lands in the late 1970s and early 1980s to raise critically-needed revenues and provide jobs for their tribal communities. S. Rep. No. 446, 100th Cong., 2d Sess. 2-3 (1988), *reprinted in* 1988 U.S. Code Cong. & Admin. News 3071, 3072-73 ("IGRA Report"); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 218-19 (1987). In several decisions culminating with this Court's decision in *Cabazon* in 1987, the federal courts repeatedly rejected attempts by state governments to subject Indian gaming to state laws. The courts held that, except in the limited circumstances in which state law has criminalized a game entirely, Indian gaming is subject only to the tribes' powers of self-government and the authority of federal law. *Cabazon*, 480 U.S. 202; *Barona Group of Capitan Grande Band of Mission Indians v. Duffy*, 694 F.2d 1185 (9th Cir. 1982), *cert. denied*, 461 U.S. 929 (1983); *Seminole Tribe of Florida v. Butterworth*, 658 F.2d 310 (5th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982); *Mashantucket Pequot Tribe v. McGuigan*, 626 F. Supp. 245 (D. Conn. 1986); *Oneida Tribe of Indians of Wisconsin v. Wisconsin*, 518 F. Supp. 712 (W.D. Wis. 1981). The Community commenced its pull-tab games in 1982.

From its beginnings, Indian gaming has been conducted with encouragement, financial support, and regulatory oversight from the federal government. As this Court

recognized in *Cabazon*, 480 U.S. at 217 & n. 20, President Reagan's 1983 Statement on Indian Policy addressed the critical importance of tribal revenue-raising to the federal government:

> It is important to the concept of self-government that tribes reduce their dependence on Federal funds by providing a greater percentage of the cost of their self-government.

19 Weekly Comp. of Pres. Doc. 99 (1983). The Department of the Interior sought to implement this federal policy by promoting tribal gaming:

> A number of tribes have begun to engage in bingo and similar gambling operations on their reservations for the very purpose enunciated in the President's Message. Given the often limited resources which tribes have for revenue-producing activities, it is believed that this kind of revenue-producing possibility should be protected and enhanced.

Policy Directive of Assistant Secretary of the Interior for Indian Affairs (Mar. 2, 1983); *see Cabazon*, 480 U.S. at 217 & n. 21 (also noting that Department of the Interior "has the primary responsibility for carrying out the Federal Government's trust obligations to Indian tribes").

In the fall of 1988, Congress enacted the Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (Oct. 17, 1988), *codified as amended at* 25 U.S.C. § 2701 *et seq.* (1994 & Supp. 1997) ("IGRA"), to further foster the tribal governments' revenue-raising efforts. IGRA Report at 2-3, 12. IGRA codified this Court's decision in *Cabazon*. 25 U.S.C. §§ 2710(b)(1)(A), (d)(1)(B); IGRA Report at 17. IGRA's stated central purpose is "to provide a statutory basis

for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments. . . .," 25 U.S.C. § 2702(1), three longstanding goals of federal Indian law. *See Cabazon*, 480 U.S. at 216 (discussing these congressional policy goals and several federal statutes enacted to promote these goals); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 n.17 (1983) (same).

Pull-tab games are a form of "Class II gaming" under IGRA's regulatory scheme. Class II gaming must be conducted in conformance with IGRA's requirements and is subject to the primary regulatory jurisdiction of Indian tribal governments and federal oversight by the National Indian Gaming Commission ("NIGC").[3] Under IGRA, as long as the state within which an Indian tribe is located permits bingo games for any purpose by any person, organization, or entity, state governments have no power to apply their laws to, or otherwise regulate, either bingo gaming conducted by tribal governments on tribal lands or pull-tab gaming conducted by such governments in the same location as the bingo gaming. 25 U.S.C. §§ 2703(7)(A)(i), 2710(b)(1)(A).

3. IGRA draws a distinction between "Class I," "Class II," and "Class III" gaming conducted on tribal lands. Class I gaming, consisting of purely social games or traditional ceremonial games, is subject to exclusive regulation by Indian tribal governments. Class II gaming, consisting primarily of bingo, pull-tabs, other games similar to bingo, and certain card games must be conducted in conformance with both IGRA and tribal law and is subject to federal oversight by the NIGC. Class III gaming, consisting of games not defined as Class I or Class II gaming, including blackjack and other banking card games, video games of chance, and slot machines, is subject to negotiation with the state governments under a tribal-state compact approved by the Secretary of the Interior. Class III gaming conducted pursuant to an approved tribal-state compact must be conducted in conformance with IGRA, tribal law, and the compact, and is subject to federal oversight by the NIGC. *See* 25 U.S.C. §§ 2703(3), (6), (7), & (8), 2710.

Section 4401(a)(1), imposing the 0.25% wagering excise tax at issue here, was enacted in a 1982 amendment to Chapter 35 of the Code lowering the tax rate from 2% on the wagers to which it applied.[4] That section taxes "wagers authorized under the law of the State in which accepted." Indian gaming is federally-authorized gaming, not state-authorized gaming, and it is apparent that Congress did not have Indian gaming in mind when it enacted Section 4401(a)(1). Indeed, Senator Cannon of Nevada, the original co-sponsor with Senator Laxalt of Nevada of the legislation resulting in this enactment, informed the Senate that the only gaming operations to which the federal wagering taxes then applied, other than illegal operations, were conducted by private, *nongovernmental* operators of sports and horse bookmaking in Nevada. 127 Cong. Rec. S2270 (Feb. 17, 1981). Similarly, in the floor debate on the same legislation, Senator Biden described the wagering taxes as applying to "legal bookies" and "illegal bookies," *id.* at S32086 (Dec. 16, 1981), not tribal governments.[5]

4. Under Section 4411's explicit terms, the $50 annual occupational tax applies to tribal governments only if the 0.25% excise tax so applies.

5. Congress passed the 1982 legislation enacting the 0.25% tax over the objection of the Treasury Department. In both the Carter and the Reagan administrations, the Treasury Department advocated the complete abolition of the wagering taxes, because they raise only "extremely minor" revenues from the perspective of the federal government and are a poor tool for enforcing the criminal gambling laws and therefore no longer serve their original purpose. *See* 127 Cong. Rec. S2270-71 (Feb. 17, 1981), S32084-85 (Dec. 16, 1981). The taxes raised revenues of only just over $12 million in fiscal year 1980, only a small fraction of the $400 million in annual revenues that was estimated when the taxes were first enacted in 1951. *Id.* at S2270-71. By fiscal year 1999, the wagering excise tax raised only $13.8 million, even less than the $19.8 million raised by the excise tax on bows and arrows and far less than the $6.6 billion and $21.2 billion raised by the excise taxes on air transportation and gasoline, respectively. *See* file 00EX20TE.EXE.

In enacting IGRA in 1988, Congress for the first time directly addressed the applicability of the Chapter 35 taxes to tribal governments. Section 2719(d) of IGRA, the construction of which is at issue here, specifically includes Chapter 35 among the Code provisions which "shall apply to Indian gaming operations . . . in the same manner as such provisions apply to State gaming and wagering operations." Section 4402(3) in Chapter 35 provides an exemption from the Chapter 35 taxes for wagers placed in state-conducted lotteries. Congress enacted IGRA and its Section 2719(d) instead of competing Indian gaming legislation that would have amended the Code to *impose* the Chapter 35 taxes on tribal governments. *See* H.R. 3605, § 10(2), 100th Cong., 1st Sess. (Nov. 3, 1987); S. 1841, § 10(2), 100th Cong., 1st Sess. (Nov. 4, 1987).

It was not until 1991, nine years after enactment of Section 4401(a)(1) of the Code and three years after enactment of Section 2719(d) of IGRA, that anyone, anywhere, ever suggested that the Chapter 35 taxes applied to tribal governments. That was the year that two IRS examining agents, in a field audit of the Community and in a concurrent field audit of another Indian tribe, developed their position proposing that the federal wagering taxes apply to the tribes. As soon as the IRS agents made their novel proposal, Senator Inouye, the Chairman of the Senate Select Committee on Indian Affairs at that time, the primary author of IGRA, and the recognized leader in Congress on matters of federal Indian law, wrote a letter to IRS Commissioner Fred Goldberg on December 12, 1991, explaining that Congress intended in Section 2719(d) that tribal governments would be treated the same as the states for purposes of Chapter 35 of the Code. Pet. App. at 112a.

On April 2, 1992, the IRS National Office issued Technical Advice Memorandum 9229005 (the "TAM")

adopting the IRS examining agents' proposal. The TAM constituted the first public statement of the IRS position, only just then developed, that tribal governments are subject to the federal wagering taxes, even though the tribes had by then been conducting pull-tab games to raise government revenues for ten or more years.

The only tribal games to which the IRS has attempted to apply the federal wagering taxes are pull-tab games, because "live games" such as bingo and blackjack are excluded from the definitions of taxable "wagers" and "lotteries" in Section 4421 of the Code and slot machines are exempt from the taxes under Section 4402(2) of the Code. Even though the federal wagering taxes are narrow in scope, their imposition works a heavy financial burden on most affected tribal governments and, indirectly, on the federal government charged with trust obligations to the tribes. As Congress noted in enacting IGRA, tribal gaming income "often means the difference between an adequate governmental program and a skeletal program that is totally dependent on Federal funding." IGRA Report at 3. Particularly for tribes dependent solely on bingo and pull-tabs to raise tribal revenues, each dollar lost to the federal wagering taxes is an important dollar lost for tribal programs.

SUMMARY OF ARGUMENT

The language of Section 2719(d) of IGRA, IGRA's overall scheme and purpose, and the relevant legislative history all support construction of Section 2719(d) to provide Indian tribes with the same exemption from federal wagering taxes provided to the states in Chapter 35 of the Code.

The language of Section 2719(d) is ambiguous, because its reference to "winnings" is inconsistent with its specific inclusion of Chapter 35 and Section 6050I, two Code provisions which have nothing to do with winnings, among

the Code provisions to be applied to Indian gaming operations in the same manner as to states. In *Little Six*, the Federal Circuit properly concluded that the tribal governments' construction giving effect to Congress's explicit reference to Chapter 35 is a more reasonable construction of the statutory language than the United States's construction reading that reference out of the statute. Giving effect to Congress's explicit reference to Chapter 35 follows the rule that all parts of a statute are to be given effect if possible. It also effectuates Congress's intent that Indian tribes would benefit from any favorable treatment of state gaming operations provided in the Code sections referenced in Section 2719(d), given the governmental nature of both Indian and state gaming. The Tenth Circuit's contrary construction of Section 2719(d) in the present case hinged on its conclusion, adopted at the United States's suggestion and without analysis, that Section 2719(d)'s reference to "Chapter 35" was intended to refer *only* to Section 4421 of that chapter, to incorporate Section 4421's definitions of "wager" and "lottery" for purposes of the winnings provisions in Section 2719(d). Even a cursory review of the language of Section 2719(d), Section 4421, and the winnings provisions shows that the Tenth Circuit's conclusory effort to harmonize the references to "Chapter 35" and "winnings" is patently unreasonable.

Giving effect to Congress's explicit reference to Chapter 35 also promotes Congress's purposes in enacting IGRA and is consistent with IGRA's overall scheme, factors which must be positively considered in construing ambiguous statutes. The Federal Circuit's reading of Section 2719(d) to provide tribal governments with the same exemption provided to the states in Chapter 35 furthers Congress's central purpose in enacting IGRA of fostering the tribes' revenue-raising efforts. The Tenth Circuit's reading, by contrast, impedes those efforts.

Other provisions of IGRA also support the Federal Circuit's construction of Section 2719(d), including the provisions throughout the statute which treat tribes and states as co-equal sovereigns and the special fee provision in Section 2717. In the latter section, Congress imposed a fee on tribal pull-tab games and other Class II gaming, based on gross revenues, to cover the federal government's costs of administering the statute. If Congress had understood that tribal pull-tab games would be subject to the federal wagering taxes on the same gross revenues, this likely would have been the subject of discussion in the legislative history, but there was no such discussion. Instead, Congress included Chapter 35 among the specific Code provisions to be applied to tribes in the same manner as to states and provided for an entirely different cost covering fee in Section 2717.

Finally, the construction of Section 2719(d) advocated by the tribal governments and adopted by the Federal Circuit is supported by the legislative history of that provision. Congress's specific inclusion of Chapter 35 among the Code provisions to be applied to tribes in the same manner as to states reflected a consistent intention, dating back to the earliest version of the provision considered in Congress, that the tribes would share the states' exemption from the Chapter 35 taxes. The United States has contended that the deletion of "taxation" from the bill language is conclusive evidence that Congress did not so intend, but this contention is unreasonable given Congress's simultaneous addition of "Chapter 35," which had been used interchangeably with "taxation," to the statutory text. In deleting the reference to "taxation," the statute's drafters appeared to be responding to tribal concerns that Section 2719(d) would be misconstrued to *impose* federal taxes on tribes. By eliminating the word "taxation" and instead specifically referring to Chapter 35, these concerns could be alleviated while still providing the tribes with the same exemption from wagering taxes enjoyed by the states.

The statutory language, IGRA's overall scheme and purposes, and the legislative history all point to the correctness of the Federal Circuit's construction of Section 2719(d), even without the Indian canon of construction. And as the Nations ably demonstrate in their brief, the Indian canon provides an additional basis for giving effect to Congress's explicit reference to Chapter 35.

ARGUMENT

A. The Federal Circuit's Construction of Section 2719(d) is the Most Reasonable Construction of the Statutory Language.

The Federal Circuit began its analysis in *Little Six* by focusing on the language of Section 2719(d), Pet. App. at 108a, which specifically includes "Chapter 35" among the Code provisions under which Indian gaming operations are to be treated the same as those run by a state. Chapter 35 is the chapter of the Code which imposes the federal wagering taxes at issue. Section 4402(3) of Chapter 35 exempts states from the federal wagering taxes for wagers placed in state-conducted lotteries, thus treating state governments more favorably than private, commercial gaming operators. Accordingly, Congress's explicit reference in Section 2719(d) to "Chapter 35" as being among the Code provisions which "shall apply to Indian gaming operations . . . in the same manner as such provisions apply to State gaming and wagering operations" reflects an intention to exempt Indian gaming operations from the federal wagering taxes for wagers placed in tribally-conducted lotteries, including pull-tab games. *Id.*

The United States had contended that Section 2719(d) only involves provisions concerning the reporting and withholding of taxes with respect to winnings. The Federal Circuit, however, recognized the inconsistency between

Section 2719(d)'s reference to "provisions . . . concerning the reporting and withholding of taxes [from] winnings" and its explicit references to Chapter 35 and Section 6050I, which do not relate to winnings. Pet. App. at 109a. Chapter 35 taxes only the operator of the gaming facility, not the players, and the tax is based on gross wagers, not winnings. Section 6050I requires a gaming operator to report cash receipts of $10,000 or more. It does not require reporting of cash payments to players, and therefore also is unrelated to "winnings."[6]

Based on the statutory language alone, the Federal Circuit properly found the Community's construction more reasonable than the United States's construction, Pet. App. at 109a, because the Community's construction gives effect and meaning to all of the statute's terms, whereas the United States's construction would render the explicit references in the statute to Section 6050I and Chapter 35 superfluous, a result that courts must attempt to avoid under well-established principles of statutory construction. *E.g.*, *Bailey v. United States*, 516 U.S. 137, 145 (1995); *Fidelity Federal Savings & Loan Association v. de la Cuesta*, 458 U.S. 141, 163 (1982) (referring to the "well-settled rule that all parts of a statute, if possible, are to be given effect"); *see* Pet. App. at 108a-109a.

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6. Thus, only three of the five sections of the Code referred to in Section 2719(d) fit within the literal limits of the "winnings" phrase. Section 1441 of the Code requires payors to withhold 30 percent of all income paid to nonresident aliens, including certain gambling winnings. Section 3402(q) requires payors to withhold a percentage of certain gambling winnings of persons not subject to withholding under Section 1441. Section 6041, as interpreted in Treasury Regulations promulgated in 1977, requires payors to report to the IRS payments of certain gambling winnings made during the course of a year. *See* 26 C.F.R. § 7.6041-1 (2000).

Under the Federal Circuit's interpretation, Sections 1441, 3402(q), and 6041, the referenced Code provisions concerning winnings, will be applied to Indian gaming operations in the same manner as to state gaming operations to ensure that players will report and pay income tax on their winnings. Section 6050I, which does not concern winnings, will be applied to require the tribes to file an IRS Form 8300 reporting cash receipts from any player in excess of $10,000.[7] Finally, Chapter 35, which does not concern winnings, will be applied to provide Indian gaming operations with the same exemption from federal wagering taxes that is provided to state lotteries under Chapter 35.

Giving effect to Congress's explicit reference to Chapter 35 is particularly important in light of its use of the clause "in the same manner as such provisions apply to State gaming and wagering operations." Congress presumably included that clause to ensure that Indian gaming operations would benefit from any *favorable* treatment of state gaming operations provided in the Code sections referenced in Section 2719(d), given the governmental nature of both Indian and state gaming. Only two of the five referenced Code sections provide the states with more favorable rules than

7. The IRS has disregarded the literal limits of the "winnings" language to apply Section 6050I to Indian gaming operations. IRS, *Indian Assistance Handbook* 31 (May 1996). The United States sought to justify this disregard in *Little Six* by contending that Section 2719(d) "include[s] reporting requirements with respect to receipts as well as winnings (although only 'winnings' is in the statute)." Brief for the Appellee, the United States, dated Sept. 3, 1999 ("U.S. Fed. Cir. Brief"), filed in Fed. Cir. No. 99-5083, p. 25 n. 8. As the Federal Circuit recognized, it is disingenuous for the United States to contend that the presence of the "winnings" phrase is conclusive in evaluating the effect of the reference to Chapter 35 but not conclusive in evaluating the effect of the reference to Section 6050I.

private, commercial operators, with the more significant favorable rule provided in Chapter 35.[8]

At the suggestion of the United States and without analysis, the Tenth Circuit attempted to harmonize Section 2719(d)'s references to "Chapter 35" and "winnings" by concluding that the reference to Chapter 35 was intended merely to incorporate the definitions of "wager" and "lottery" in Section 4421 of Chapter 35. Pet. App. at 25a. The United States elaborated on its position on this point in its petition for rehearing *en banc* in *Little Six*, contending that Section 2719(d)'s incorporation of Section 4421's definitions would ensure that the winnings provisions (*i.e.*, Sections 1441, 3402(q), and 6041) apply to "all forms" of wagers and lotteries as defined in Section 4421 and not just "more traditional, well-known gaming operations." Petition for Rehearing En Banc by Appellee, the United States, dated June 2000 ("U.S. Rehearing Petition"), filed in Fed. Cir. No. 99-5083, p. 8. This "explanation" for Section 2719(d)'s reference to "Chapter 35" is belied by the language of both Section 2719(d) and Section 4421, as well as by the language of the winnings provisions themselves.

Section 2719(d) provides that the *entire* Chapter 35, not just Section 4421 thereof, shall be applied to Indian gaming operations in the same manner as to the states. Chapter 35's central feature involving states, of course, and the one that Congress presumably had in mind in providing for equal

8. The other referenced Code section treating states more favorably than private operators was Section 3402(q). When IGRA was enacted, Section 3402(q)(3)(B) provided states with a $5,000 minimum level of lottery winnings with respect to which income tax withholding was required, rather than the $1,000 minimum level that applied to other lotteries under Section 3402(q)(3)(C). Section 3402(q) has been amended since the enactment of IGRA to equalize the minimum level for withholding at $5,000 for both states and private operators.

treatment of tribes and states for purposes of Chapter 35, is the exemption from the Chapter 35 taxes provided in Section 4402(3) for state lotteries. Section 4421, on the other hand, states explicitly that its definitions of "wager" and "lottery" apply *only* "for purposes of this chapter [*i.e.*, Chapter 35]," not for purposes of Section 2719(d) of IGRA or any other statutory provisions.

The winnings provisions themselves bear out the separateness of Chapter 35's definitional provisions. Each of the winnings provisions referenced in Section 2719(d) applies to its own uniquely defined universe of wagers, each considerably different from the "wagers" and "lotteries" defined in Section 4421 of Chapter 35. For example, Section 4421's definitions of "wager" and "lottery," which *exclude* bingo and keno games because they are "live" games, do *not* apply under Section 1441, which *requires* withholding from nonresident aliens' winnings in bingo and keno games, or under Section 6041, which *requires* reporting to the IRS of U.S. citizens' and U.S. residents' winnings in bingo and keno games over certain dollar thresholds. 26 C.F.R. § 7.6041-1. Thus, the Tenth Circuit's construction of the reference to "Chapter 35" as referring only to Section 4421 to incorporate Section 4421's definitions for purposes of Sections 1441, 3402(q), and 6041, is patently unreasonable.[9]

9. The United States made several equally unpersuasive attempts at various stages of the *Little Six* case to harmonize the references to "Chapter 35" and "winnings." In its latest attempt, made in its petition for rehearing *en banc*, the United States maintained that Chapter 35 contains provisions in Sections 4403 and 4412 which are "at least arguably related to reporting and withholding requirements in that they deal with matters of tax administration, not tax liability," whereas the taxing provisions in Chapter 35 are not so related. U.S. Rehearing Petition p. 9 n.5. Section 4403 imposes a record-keeping requirement on each person liable for the Chapter 35 excise tax. Section 4412 imposes a registration requirement on each person liable for the Chapter 35 occupational tax. Even if these provisions may be "arguably related

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The United States contended in *Little Six* that if Congress had intended to create an exemption from the Chapter 35 taxes for tribes, it would have done so within the "existing statutory frameworks" of Section 4402 or 7871 of the Code[10] rather than in an Indian affairs statute, but this speculation ignores both history and the language of Section 2719(d). Congress has enacted numerous statutes relating to taxes which are not contained in the Code, particularly in the area of Indian affairs. Title 25 of the United States Code, codifying

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to" reporting and withholding requirements, they are not provisions concerning "the reporting and withholding of taxes [from] winnings." Thus, this explanation failed to harmonize the "Chapter 35" and "winnings" references. More important, the states are exempt from the requirements of Sections 4403 and 4412, because they are exempt from the Chapter 35 taxes under Section 4402(3). It would make no sense to construe Section 2719(d) to treat Indian gaming operations as states for purposes of Sections 4403 and 4412, exempting them from the record-keeping and registration requirements, unless Section 2719(d) also was intended to treat Indian gaming operations as states for purposes of Section 4402(3)'s tax exemption provision.

Even Judge Dyk's dissent from the denial of rehearing in *Little Six* conceded "there is no way to reconcile" the references to "Chapter 35" and "winnings." Appendix A to Brief for the United States on petition for certiorari at 3a. His solution to the construction question, however, was to discard Section 2719(d)'s reference to Chapter 35 as surplusage, violating the rule that all statutory language must be given effect if possible, construing the statute in a manner inconsistent with IGRA's stated purposes, entire structure, and legislative history, and, of course, also violating the Indian canon of construction. Even though Judge Dyk concluded that the "legislative history here provides no clear guidance" regarding the proper construction of the statute, *id.* at 7a, under these circumstances Judge Dyk should have applied the Indian canon.

10. Section 4402 in Chapter 35 sets forth various exemptions from the Chapter 35 taxes, including the exemption in Section 4402(3) for state lotteries. Section 7871 enumerates several provisions of the Code with respect to which "[a]n Indian tribal government shall be treated as a State," including certain excise tax provisions.

IGRA and most of the numerous federal Indian statutes, includes eighty or more provisions regarding federal tax exemptions and other federal tax matters. *E.g.*, 25 U.S.C. §§ 117b, 500g, 645, 1185, and 1407 (1994). Even more to the point here, Congress's inclusion of subparagraph (2) in Section 2719(d), providing that "[t]he provisions of this subsection shall apply notwithstanding any other provision of law enacted before . . . October 17, 1988," underscores the fact that Section 2719(d)'s provisions apply notwithstanding any "existing statutory frameworks." Indeed, Congress obviously was mindful of Section 7871 in referring to "any other provision of law enacted before . . . October 17, 1988" in subparagraph (2), because Congress evidently patterned Section 2719(d)(1) after Section 7871 in enumerating Code provisions which shall apply to Indian gaming operations in the same manner as to states.

Like the Tenth Circuit's failed attempt to harmonize the "Chapter 35" and "winnings" references, the United States's speculation that Congress would have amended the Code if it intended to treat tribes like states for purposes of Chapter 35 ignores the relevant statutory language. Only the Federal Circuit, in *Little Six*, has given proper effect to the language of Section 2719(d).

B. The Federal Circuit's Construction of Section 2719(d) Is Consistent with the Stated Purposes and Entire Structure of IGRA.

When construing an ambiguous statute, the Court must "look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy." *Crandon v. United States*, 494 U.S. 152, 158 (1990). The Federal Circuit's reading of Section 2719(d) to give effect to Congress's explicit reference to Chapter 35 as a whole promotes Congress's purposes in enacting IGRA and is consistent with IGRA's entire structure, whereas the Tenth

Circuit's reading — as if Chapter 35 as a whole were not mentioned — frustrates those purposes and is inconsistent with that structure. The Federal Circuit's reading, therefore, is the appropriate reading under *Crandon*'s principles.

Congress's central purpose in enacting IGRA was "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1). Gaming promotes these goals for one obvious reason: it provides tribal governments with a mechanism for raising critically needed tribal revenues.

Not surprisingly given these goals, there is no indication anywhere in the statute that IGRA was intended as a general revenue raising measure for the federal government. Rather, it is clear that IGRA was enacted to foster the tribes' efforts to raise their *own* government revenues:

> [B]ingo revenues have enabled tribes, like lotteries and other games have done for State and local governments, to provide a wider range of government services to tribal citizens and reservation residents than would otherwise have been possible. . . . [F]or those tribes that have entered into [gaming operations], the income often means the difference between an adequate governmental program and a skeletal program that is totally dependent on Federal funding.
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> * * *
>
> The Committee views tribal gaming as governmental gaming, the purpose of which is to raise tribal revenues for member services.

IGRA Report at 2-3, 12.

> From time immemorial, Tribes have been and will continue to be permanent governmental bodies exercising those basic powers of government, as do Federal and State governments, to fulfill the needs of their members.

Id. at 34 (additional views of Senator McCain). In construing Section 2719(d), the Court should prefer the reading that more effectively furthers Congress's central purpose of fostering the tribal governments' revenue-raising efforts, providing tribes with the same exemption from wagering taxes that is provided to the states.

Other provisions of IGRA support this reading as well. Section 2717 of IGRA, 25 U.S.C. § 2717, is especially pertinent. In that section, Congress imposed a special fee on tribal pull-tab games and other Class II gaming operations, at rates ranging from 0.5 percent to 5 percent of gross revenues, for the purpose of funding the operations of the National Indian Gaming Commission, the federal regulatory agency charged with oversight of Indian gaming.[11] If Congress had understood or intended that tribal pull-tab games would be subject to the federal wagering excise tax on the same gross revenues, additional assessment of a fee to fund the NIGC either would not have been necessary or at least would have been the subject of discussion in the legislative history concerning whether to impose both the taxes and the fee, but there was no such discussion. *See, e.g., Gaming Activities on Indian Reservations and Lands: Hearing before the Select Comm. on Indian Affairs, United States Senate on S. 555 and S.1303*, 100th Cong., 1st Sess. 98, 113-15, 285, 478 (June 18, 1987) ("IGRA Hearings"). In fact, there is no support in the legislative history for an interpretation that IGRA was intended as a revenue raising

11. Congress amended Section 2717 in 1997 to subject Class III gaming to the special fees and to increase the total annual fees from $1,500,000 to $8,000,000. Pub. L. No. 105-83, Title I, § 123(a)(1), (2)(A), (B), 111 Stat. 1566 (Nov. 14, 1997).

measure for the federal government, only that the federal government was interested in covering the costs of administering the statute. *See, e.g., id.* at 98. Indeed, the Executive Branch agencies supported the fee concept precisely because there were no federal taxes imposed on tribal gaming operations:

> There will be no collection of Federal taxes on the Indian gambling enterprise; [therefore] only a very limited amount of our tax money should be paid out in order to regulate it.

Hearings before the Select Comm. on Indian Affairs, United States Senate on S. 902, 99th Cong., 2d Sess. 48-49 (June 17, 1986) (testimony of Deputy Attorney General Victoria Toensing regarding position of Justice and Interior Departments). Had Congress wished to use Chapter 35 to cover the federal government's regulatory costs, it certainly could have done so, but that chapter's inclusion in Section 2719(d) coupled with an entirely different cost covering fee in Section 2717 provides additional evidence that Congress intended that Indian gaming operations would share the states' exemption from the Chapter 35 taxes.

Finally, IGRA repeatedly makes clear that tribes and states are to be treated as co-equal sovereigns for gaming purposes. *See, e.g.*, 25 U.S.C. § 2710(a) (tribes have exclusive jurisdiction to regulate Class I gaming and primary jurisdiction to regulate pull-tab games and other Class II gaming, with no involvement by the states); 25 U.S.C. § 2710(d) (tribes and states to negotiate compacts for Class III gaming); *see also* IGRA Report at 13 ("The Committee concluded that the compact process is a viable mechanism for sett[l]ing various matters between two equal sovereigns."). As the Federal Circuit recognized, equation of the tribes and the states for purposes of the Chapter 35 taxes is consistent with their status under IGRA as co-equal sovereigns. Pet. App. at 111a.

C. The Legislative History of IGRA Supports the Conclusion that Congress Intended Indian Gaming Operations to Be Treated the Same as States for Purposes of Chapter 35 of the Code.

The passage of Indian gaming legislation was a long and arduous process. It took over a dozen bills in three Congresses before the enactment of IGRA in October 1988. IGRA Report at 3-6. Not surprisingly, the vast majority of the extensive legislative history focused on whether Indian gaming should be allowed, which games should be allowed, and under which government's regulation. *See, e.g., id.* The emphasis was not on taxation, nor on many other issues that have since led to litigation. What evidence there is, however, *supports* the Federal Circuit's holding in *Little Six* that Congress intended to place Indian gaming operations on the same footing as state gaming operations for purposes of Chapter 35 of the Code.

The first Indian gaming measure to be reported out of any committee of Congress was H.R. 1920 in 1986, and it was also the first to include any significant provision related to taxation. Section 4 of that bill, as passed by the full House of Representatives in April 1986, provided:

> Provisions of the Internal Revenue Code of 1954, as amended, concerning the taxation and the reporting and withholding of taxes pursuant to the operation of a gambling or wagering operation shall apply to the operations in accord with the Indian Gaming Regulatory Act the same as they apply to State operations.

H.R. 1920, § 4, 99th Cong., 2d Sess. (Apr. 21, 1986). From this statutory section, it is clear that the House did not intend that any "taxation" relating to gaming be imposed on tribes if it would not also be imposed on a state operating the same game. The House report accompanying H.R. 1920 specifically equated the reference to "taxation" with Chapter 35:

> Section 4 provides that relevant provisions of the Internal Revenue Code, such as section 3402(q) *and chapter 35*, 26 U.S.C., *concerning taxation* and the reporting and withholding of taxes relating to the operation of gaming activities shall apply to tribal gaming activities as they apply to State operated gaming activities.

H.R. Rep. No. 488, 99th Cong., 2d Sess. 12 (1986) ("House Report") (emphasis added).

In the next Congress, two bills in the Senate received the most attention: S. 555 (which became IGRA) and S. 1303, both of which included sections incorporating the taxation language from H.R. 1920 almost verbatim. Section 20(d) of S. 555 originally read:

> Provisions of the Internal Revenue Code of 1986, concerning the taxation and the reporting and withholding of taxes with respect to gambling or wagering operations shall apply to Indian gaming operations conducted pursuant to this Act the same as they apply to State operations.

S. 555, § 20(d), 100th Cong., 1st Sess. (Feb. 19, 1987); *see also* S. 1303, § 4(c), 100th Cong., 1st Sess. (June 2, 1987) (containing similar language). A joint hearing was held on the two bills, encompassing hundreds of pages of oral and written testimony. IGRA Hearings, *supra*. Those hearings support the view that Congress's only concern regarding federal revenue was that Indian tribes be asked to contribute to the cost of the regulation of Indian gaming, which was ultimately accomplished in Section 2717 of IGRA. *See, e.g., id.* at 98, 113-15, 285, 478. Except as discussed

below, there is no relevant substantive discussion of the tax provisions in the two bills and certainly no indication that Congress believed that tribes were or should be subject to federal wagering taxes.[12]

When S. 555 was reported out of the Senate Select Committee on Indian Affairs on August 3, 1988, the parenthetical specifically referencing Chapter 35 had been added to Section 2719(d) and the reference to "the taxation and the reporting and withholding of taxes" had been replaced with the more elaborate, inconsistent "winnings" language.

None of the hearings or other legislative history explains the reasons for the drafting changes, but the inclusion of the parenthetical is subject to only one reasonable interpretation. Rather than using the general concept of "taxation," it must have seemed important to the Committee to specify the tax statutes to which Section 2719(d) would apply. The specific reference to Chapter 35 must have been the outgrowth of a desire, adopted by the Committee and eventually by both houses of Congress, to ensure that Indian gaming operations, like the states, would not be subject to the wagering taxes which Chapter 35 otherwise imposes. As discussed above, the reference to Chapter 35 would make no sense if Indian gaming operations were not intended to be subject to the exemption for the states in Section 4402(3) of Chapter 35. Indeed, the reference to Chapter 35 in Section 2719(d) reflected a consistent intention, dating back to H.R. 1920, the earliest version of the provision considered in Congress, that the tribes would share the states' exemption from the Chapter 35 taxes. *See* House Report at 12 (equating original "taxation" language and "chapter 35").

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12. As discussed above, the first time that anyone, anywhere, ever suggested that the Chapter 35 taxes applied to tribes was in 1991, when two IRS examining agents proposed to apply these taxes in contemporaneous audits of the Community and another Indian tribe.

The introduction of the reference to "winnings" is also readily understandable. Congress was concerned that *tribal* tax exemptions should not also allow the *players* at tribal gaming halls to escape taxes on their winnings. *See* IGRA Hearings at 121-22. Congress wanted to ensure that the IRS would be able to track those players who won significant amounts of money at tribal bingo halls and casinos.

The deletion of the blanket word "taxation" must be understood in the context of the above changes. The deletion of "taxation" appears to be related to the replacement of the broad phrase "reporting and withholding of taxes with respect to gambling or wagering operations" with the narrower phrase "reporting and withholding of taxes with respect to the winnings from gaming or wagering operations." The statute's drafters appear to have been concerned about including blanket references to "taxation" and to "reporting . . . of taxes" for fear that these phrases would be read too broadly and misunderstood by tribal communities or others as suggesting a congressional intention to *impose* federal taxes on tribal governments through Section 2719(d). Indeed, the only relevant substantive discussion of the tax provisions in the hearings reveals this misunderstanding by tribal witnesses:

> Language on the applicability of the Internal Revenue Code [in S. 1303] is unacceptable because it appears to create IRS authority to tax tribes. The intent is unclear. Too vague to be useful. Distinguish between taxation and the withholding of taxes.
>
> * * *
>
> It should be clearly stated [in Section 20 of S. 555] that the Internal Revenue Service is not being granted authority to tax tribes.

IGRA Hearings at 433, 435 (written statement of Charles W. Blackwell, American Indian Tribal Government and Policy Consultants, Inc.). Similarly:

> We're opposed to any indication where Internal Revenue would be collecting taxes from the tribal bingo operations.
>
> * * *
>
> There are a number of treaties in the past history which state that Indian tribal governments will not be taxed, and we wish that those be recognized and upheld. That's a major concern of our[s], and we would hope that you[r] committee would take appropriate action on our behalf.

Id. at 109 (testimony of Lionel John, Executive Director of United South and Eastern Tribes).

By eliminating the word "taxation" and instead specifically referring to Chapter 35, Congress could alleviate tribal concerns that Section 2719(d) would be misconstrued to impose federal taxes on tribes and still provide Indian gaming operations with the same exemption from wagering taxes enjoyed by the states. Indeed, in enacting IGRA and its Section 2719(d), Congress rejected proposals in competing Indian gaming legislation to impose the Chapter 35 taxes on tribes.[13] While we may in retrospect wish Congress

13. H.R. 3605, introduced by Nevada Representatives Vucanovich and Bilbray, proposed to amend Section 7871 of the Code to provide that "[a]ny form of gaming activity on Indian lands . . . will be subject to the requirements of chapter 35 . . . of the Code." H.R. 3605, § 10(2), 100th Cong., 1st Sess. (Nov. 3, 1987). S. 1841, introduced by Nevada Senators Hecht and Reid, included an identical proposal. S. 1841, § 10(2), 100th Cong., 1st Sess. (Nov. 4, 1987). These bills were not reported out of committee, because Congress chose instead to enact IGRA. *See* IGRA Report at 4-5 (noting these bills and other competing legislative proposals).

had chosen more artful language in Section 2719(d), this is nevertheless the most reasonable explanation for how the ambiguity in that provision arose.[14]

In summary, the language of Section 2719(d), IGRA's overall statutory scheme and purpose, and the legislative history all support the Federal Circuit's construction of Section 2719(d) to treat the tribes and states equally for purposes of Chapter 35 of the Code. Thus, even without the important Indian canon of construction, the Nations should prevail in this case. Of course, to the extent that there is any doubt regarding the appropriate construction of Section 2719(d), then the Indian canon, faithfully applied by this Court for nearly 200 years, requires that such doubt be resolved in favor of the Federal Circuit's reasonable construction benefiting the tribes, as ably demonstrated in the brief of the Nations.

14. In *Little Six*, the United States attempted to find significance in the fact that the Senate committee report said nothing about Chapter 35 in the section-by-section analysis of IGRA, U.S. Fed. Cir. Brief pp. 24-25, but Congress itself, and not merely a committee thereof, expressly referred to Chapter 35 in the text of Section 2719(d). Moreover, this was consistent with its equation of "Chapter 35" and "taxation" in the section-by-section analysis of the earlier version of the bill passed by the House. That the Senate report focused on the fact that *players* of tribal games would be subject to income tax does not detract in any way from the statute's reference to Chapter 35. To the contrary, whereas some very affirmative indication that Congress intended its reference to Chapter 35 to have no force or effect would be necessary to read the reference out of the statute, the silence in the legislative history suggests that the statute's explicit incorporation of the Chapter 35 reference was uncontroversial.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Tenth Circuit should be reversed.

Respectfully submitted,

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